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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:  DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RIGOBERTO ARZATE MIRANDA,
BOP #46404-359,

Plaintiff,

vs.

MARC CARLOS; MARK CHAMBERS;
STEPHEN PETERSON,

Defendants.

Civil No. 08-1566 W (PCL)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT WITHOUT
PREJUDICE FOR FAILING TO STATE
A CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b)**

I. Procedural History

On October 31, 2008, Plaintiff, an inmate currently incarcerated at the Metropolitan Correctional Center located in San Diego, California, proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. This Court granted Plaintiff's Motion to Proceed IFP but simultaneously dismissed his Complaint for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). *See* Nov. 12, 2008 Order at 6. Nonetheless, Plaintiff was granted leave to file an Amended Complaint in order to correct the deficiencies of pleading identified in the Court's Order. *Id.* On December 8, 2008, Plaintiff filed his First Amended Complaint ("FAC").

1 **II. Sua Sponte Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

2 As the Court stated in its November 12, 2008 Order, the Prison Litigation Reform Act
 3 (“PLRA”) requires courts to review complaints filed by prisoners against officers or employees
 4 of governmental entities and dismiss those or any portion of those found frivolous, malicious,
 5 failing to state a claim upon which relief may be granted, or seeking monetary relief from a
 6 defendant immune from such relief. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*,
 7 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d
 8 443, 446 (9th Cir. 2000) (§ 1915A).

9 Prior to the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only
 10 frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28 U.S.C.
 11 §§ 1915(e)(2) and 1915A now mandate that the court reviewing a prisoner’s suit make and rule
 12 on its own motion to dismiss before directing that the complaint be served by the U.S. Marshal
 13 pursuant to FED. R. CIV. P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires
 14 a district court to dismiss an in forma pauperis complaint that fails to state a claim.”); *Barren v.*
 15 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). The district court should grant leave to
 16 amend, however, unless it determines that “the pleading could not possibly be cured by the
 17 allegation of other facts” and if it appears “at all possible that the plaintiff can correct the
 18 defect.” *Lopez*, 203 F.3d at 1130-31 (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
 19 1995); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990)).

20 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 21 allegations of material fact and must construe those facts in the light most favorable to the
 22 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 23 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while liberal
 24 construction is “particularly important in civil rights cases,” *Ferdik v. Bonzelet*, 963 F.2d 1258,
 25 1261 (9th Cir. 1992), the court may nevertheless not “supply essential elements of the claim that
 26 were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268
 27 (9th Cir. 1982).

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1 As currently pleaded, it is clear that, once again, Plaintiff's First Amended Complaint
 2 fails to state a cognizable claim under 42 U.S.C. § 1983. Section 1983 imposes two essential
 3 proof requirements upon a claimant: (1) that a person acting under color of state law committed
 4 the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or
 5 immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983;
 6 *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*,
 7 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

8 The only named Defendants in this action are private defense attorneys that were
 9 appointed to represent Plaintiff in his criminal proceedings. (*See* FAC at 1-3.) However, as the
 10 Court previously informed Plaintiff, this action must be dismissed because a person "acts under
 11 color of state law [for purposes of § 1983] only when exercising power 'possessed by virtue of
 12 state law and made possible only because the wrongdoer is clothed with the authority of state
 13 law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*,
 14 313 U.S. 299, 326 (1941)). Attorneys appointed to represent a criminal defendant during trial,
 15 do not generally act under color of state law because representing a client "is essentially a private
 16 function ... for which state office and authority are not needed." *Polk County*, 454 U.S. at 319;
 17 *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992). Thus, when publicly
 18 appointed counsel are performing as advocates, *i.e.*, meeting with clients, investigating possible
 19 defenses, presenting evidence at trial and arguing to the jury, they do not act under color of state
 20 law for section 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County*,
 21 454 U.S. at 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc)
 22 (finding that public defender was not a state actor subject to suit under § 1983 because, so long
 23 as he performs a traditional role of an attorney for a client, "his function," no matter how
 24 ineffective, is "to represent his client, not the interests of the state or county.").

25 Accordingly, Plaintiff's claims against Defendants Carlos, Chambers and Peterson must
 26 be dismissed for failing to state a claim upon which section 1983 relief may be granted. *See* 28
 27 U.S.C. § 1915(e)(2)(B)(ii) & 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

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Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack on the validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C. § 1983 unless and until he can show that conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983....’”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim challenging the legality of a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

In *Heck*, the Supreme Court held that:

when a state prisoner seeks damages in a section 1983 suit, the district court must consider *whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

Heck, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed for failure to state a claim without prejudice to Plaintiff’s right to file a new action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

Here, Plaintiff’s ineffective assistance of counsel claims against his criminal defense appointed counsel “necessarily imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Defendants Carlos, Chambers and Peterson, who were appointed to represent him, rendered ineffective

1 assistance of counsel, an award of damages would “necessarily imply the invalidity” of his
 2 conviction. *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed on
 3 ineffective assistance claim petitioner must show that counsel’s performance fell below objective
 4 standard of reasonableness and that but for counsel’s errors the result of the trial would have
 5 been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective
 6 assistance of counsel is a conditional writ granting petitioner’s release unless state retries him
 7 or allows him to pursue an appeal with the assistance of counsel within a reasonable time).
 8 Thus, because Plaintiff seeks damages for an allegedly unconstitutional criminal proceedings
 9 in a criminal case, and because he has not alleged that his conviction has already been
 10 invalidated, a section 1983 claim for damages has not yet accrued. See *Heck*, 512 U.S. at 489-
 11 90.

12 Accordingly, the Court finds that Plaintiff’s First Amended Complaint must be
 13 **DISMISSED** for failing to state a claim upon which relief can be granted pursuant to 28 U.S.C.
 14 §§ 1915(e)(2) and 1915A.

15 **III. Conclusion and Order**

16 Plaintiff’s First Amended Complaint is **DISMISSED** for failing to state a claim upon
 17 which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). Moreover,
 18 because the Court finds amendment of Plaintiff’s § 1983 claims would be futile at this time,
 19 leave to amend is **DENIED**. See *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir.
 20 1996) (denial of a leave to amend is not an abuse of discretion where further amendment would
 21 be futile); see also *Robinson v. California Bd. of Prison Terms*, 997 F. Supp. 1303, 1308 (C.D.
 22 Cal. 1998) (“Since plaintiff has not, and cannot, state a claim containing an arguable basis in
 23 law, this action should be dismissed without leave to amend; any amendment would be futile.”)
 24 (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

25 The Clerk shall close the file.

26 **IT IS SO ORDERED.**

27 DATED: 1/5/09


 28 **HON. THOMAS J. WHELAN**
 United States District Judge